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IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

v.

THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

No. 264.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIFF FOR THE DEFENDANT IN ERROR.

WILLIAM A. KETCHAM,
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ROSCOE O. HAWKINS,
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Of Counsel.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT.

IN ADDITION TO THE FACTS CONTAINED IN PLAINTIFF IN ERROR'S STATEMENT OF THE RECORD.

The complaint declares upon the special charter granted to the plaintiff in error by the act of the general assembly of Indiana of January 26, 1847, as containing in its 22d,

23d and 24th sections a contract obligation which was sought to be enforced by the suit. (Record, pp. 2-4.)

It sets out the special charter in full, as exhibit "A," as required by the code of pleading and practice as to written instruments which are the foundation of the action.

1 Burns R. S. 1901, §365.

It avers that the 35th section of the special charter was repealed in 1848 at the procurement and with the consent of the defendant (now the plaintiff in error), but refers to said section and makes it a part of the complaint "for the purpose of arriving at the true construction to be given to section 23, which, with the remainder of sections 22 and 24 remained in full force, unamended and unrepealed except that the 23d section was amended by the act of February 24, 1897." (Acts 1897, p. 59.)

In this connection the amended section is set out. (Record, p. 3.)

The complaint further states the acts done by plaintiff in error in effecting an organization under the special charter, in accepting and assuming the franchises granted thereby, and in constructing, completing and operating its railroad, and then states the rights granted to and the obligations imposed upon plaintiff in error, as to fixing tolls and freight, the amount of dividends that might be paid, and the time of payment thereof, the sum upon which dividends should be computed, and as to payment of the surplus earnings to the state treasurer for the use of the common schools. These statements all have reference to sec-

tions 22, 23 and 24 of the act of January 26, 1847, in their original form. (Record, pp. 4-5.)

It is averred that by the act of January 27, 1897 (Acts 1897, p. 8), the plaintiff in error was required by the general assembly to make a true statement of the cost of construction of its railroad, operating expenses and gross and net receipts, and that in pretended compliance with the act a pretended statement was made, but only upon the information of the then officers of plaintiff in error by whom it was made, who stated that the details could not be given because the books professing to show such facts were not in their possession. That thereupon the act of February 18, 1897 (Acts 1897, p. 38), to amend section 36 of the general railroad law, and also the act of February 24, 1897, to amend section 23 of the act of January 26, 1847, were passed, and afterwards the act of March 4, 1897 (Acts 1897, p. 145), which latter act appropriated for the use of the common schools the surplus earnings of the plaintiff in error claimed to be payable to the treasurer of state, and required plaintiff in error to account with the attorney-general in relation thereto, and authorized the attorney-general to demand such accounting, and payment of the moneys found thereby to be payable. It is further averred that such demand was made, but that plaintiff in error had wholly failed, neglected and refused to comply therewith. (Record, p. 14.)

The complaint also averred the facts in reference to the suit brought in 1875 in the superior court of Marion county, Indiana, by the state upon the relation of the then

attorney-general against the plaintiff in error to recover the same moneys, and set out the complaint in that suit in full as exhibit "B." It is averred that a demurrer to the complaint was sustained, that the plaintiff refused to amend the complaint, and elected to abide thereby and thereupon judgment was rendered that the plaintiff take nothing by the action. Copies of the demurrer and judgment are set out as exhibits "C" and "A." It is averred that the attorney-general was without authority to institute and prosecute the suit. The complaint in that suit contained no averment that the general assembly of the state had ever authorized a demand to be made for an accounting in respect of the moneys for the recovery of which the suit was brought, or for the payment of such moneys, or that any such demand had been made. (Record, pp. 12-13, 22-35.)

The plaintiff in error demurred to the complaint upon the general ground that it did not state facts sufficient to constitute a cause of action, and upon the specific grounds that it sought to deprive plaintiff in error of its vested property rights by virtue of the original charter and the judgment set forth in the complaint, and to accomplish that result invoked the aid of the laws enacted in 1897, which said laws, and all of the acts of defendant in error in endeavoring to deprive plaintiff in error of its property and to invalidate said judgment, were in violation of section 10 of article I, and of article V of the constitution of the United States, and of section 1 of article XIV of the amendments to said constitution. (Record, p. 36).

This demurrer was overruled, and the opinion of the court given thereon, was made a part of the record by order of the court, in accordance with the Indiana practice. (1 Burns R. S. 1901, §662.) The opinion appears in the record at pp. 37-45.

It shows that the court held that the contract obligation to enforce which the suit was brought, must be found exclusively in sections 22, 23 and 24 of the act of January 26, 1847, without reference to the legislation of 1897, and that by the provisions of these sections, an obligation was imposed upon the plaintiff in error to account for and pay over to the treasurer of state for the use of the common schools, but not until after demand had been duly made, its surplus earnings remaining after reservation of a fund for contingencies, the payment of dividends on the full sum invested in the shares of capital stock until the aggregate of such dividends equaled such sum and 10 per centum per annum thereon, and, thereafter, of an annual dividend of 15 per centum on such sum (record, pp. 37-41); that the attorney-general had authority to bring the former action (record, pp. 42-43), but that the judgment therein was not a defense to the pending action, for the reason that the causes of action were not the same, inasmuch as the complaint in the former action did not aver that a demand for accounting and payment had been made, and no such demand had in fact been made, whereas in the pending action the complaint averred that such demand had been made before the action was begun. (Record, pp. 43-45.) As to the special contention made

by the demurrer that the cause of action sought to be enforced depended upon the legislation of 1897, and that such legislation was void as being in violation of the constitution of the United States, the court said:

> "In construing the provisions of the defendant's charter, so far we have given no consideration to the legislation enacted in 1897 for the reason that in so far as it attempts, if it does so attempt, to add or to change the liabilities or obligations of the defendant, whether by express provision, interpretation, or retroactive operation, it is in violation of the constitution, and therefore invalid. In so far, however, as such legislation provides a remedy for enforcing an existing obligation, or confers upon any officer authority to do any act or thing in the furtherance of existing rights, it is valid and binding." (Record, p. 42.)

The opinion further shows that the Act of 1851 by which plaintiff in error was relieved of its obligation under the special charter to construct a railroad extending from Richmond, Indiana, by way of Indianapolis and Terre Haute, to the Illinois state line, and permitted to construct a railroad extending only from Indianapolis to the state line, was relied upon by plaintiff in error in support of the demurrer, and being a public act was considered by the court, which held that it did not relieve plaintiff in error from the obligations in favor of the state created by sections 22, 23 and 24 of the special charter. (Record, pp. 41-42.)

Also that the question as to whether the acceptance by plaintiff in error in 1873 of the general railroad law, and the surrender thereby effected of the special charter under the provisions of section 36 of the general railroad law, the fact of such acceptance and surrender being averred in the complaint, was considered and decided by the court, which held that "the only effect of such action was to release plaintiff in error's right to operate under the special charter thereafter, but in no way affected plaintiff in error's obligations to the state, or other parties, previously incurred, as to which the special charter would remain in full force until such obligations were discharged." (Record, p. 42.)

In plaintiff in error's statement, it is said the second, third and eleventh paragraphs of answer set up a defense under the constitution of the United States, and that the court sustained a demurrer to the second and eleventh paragraphs, and at the trial, overruled the defense under the constitution of the United States set up in the third paragraph. The second paragraph (record, p. 45) tendered no issue of fact. It averred that at the solicitation of plaintiff in error, and before any part of its railroad had been completed and put in operation, the general assembly amended its special charter by an act approved January 20, 1851, by which plaintiff in error's railroad was terminated at Indianapolis instead of Richmond, Indiana, and that plaintiff in error had only constructed and operated its railroad between the Illinois state line and Indianapolis. It also averred that plaintiff in error ac-

cepted the provisions of the general railroad law on the 17th day of January, 1873. It denied that at the time of such acceptance it was indebted to the defendant in error in any sum for any profits made in the operation of its road, or was now so indebted. It contained nothing in addition except the assertion that the legislation of 1897 is invoked by defendant in error to deprive it of its property and vested rights in violation of the constitution of the United States. The third paragraph was demurred to but this demurrer was overruled (record, p. 52), and a reply to said paragraph was filed (record pp. 52-56), to which the plaintiff in error demurred. This demurrer was overruled. The third paragraph of answer averred the institution of the former suit in the superior court of Marion county, and the rendition of the judgment therein in favor of the plaintiff in error on demurrer to the complaint. It did not set out a copy of the complaint, either independently or by reference to the copy set out as an exhibit with the complaint in this action. It averred that the matters adjudicated in said case were and are one and the same as those mentioned in the complaint in this action, and that the judgment upon demurrer was a full, final and complete settlement of all matters connected with or in any way referring to any and all claims of the state of Indiana against plaintiff in error, for the payment by the plaintiff in error of any portion of its profits to the treasurer of the state for the use of the common schools of the state of Indiana, under the said Act of January 26, 1847, and all matters connected with or in any

way referring to the claims of the state of Indiana for an accounting with or the payment by plaintiff in error to said state of Indiana for the use of its common schools of any portion of the profits or earnings of the plaintiff in error under the terms of the original charter and the acts amendatory thereof. (Record, pp. 49-50.) The reply set out a copy of the complaint in the former action and averred that at the time of the institution of the said suit in 1875, there had been no demand made upon the plaintiff in error for an accounting or for the payment of any sum, nor had there been any authority conferred by the general assembly upon the attorney-general, or any other officer of the state to demand such accounting, or payment, or to institute a suit therefor, and said suit was instituted, prosecuted, and said judgment rendered, without any demand or without any authority to make any demand upon the defendant therein, in that behalf, and that there was no averment in the complaint that a demand for an accounting or for the payment of moneys upon such accounting had been made, or that the defendant had denied its liability or had refused to account and pay, wherefore it was denied that the judgment upon such complaint determined the cause of action presented by the complaint in this action. (Record, p. 55.) As to the legislation of 1897 which the third paragraph of answer averred was relied upon by the plaintiff, now defendant in error, to vacate and annul the judgment in the former action and to destroy the vested rights of defendant in and to its property, earnings and profits accrued previous

to 1897 under the provisions of its original charter and the acts amendatory thereof, and take defendant's property for public use without just compensation, and to deprive defendant of its property and the enjoyment thereof without due process of law in violation of the constitution of the United States (record, p. 50); the reply denied that such legislation had been enacted, or effected, or was relied upon by the state for any such purpose, and averred that on the contrary said legislation was enacted for the purpose of providing for the enforcement against the defendant, now plaintiff in error, of the rights in favor of the state, as they, at that time, existed without seeking, in any manner whatever, to change said rights or to create a new or other liability than such as then rested upon said defendant. (Record, p. 55.) The plaintiff in error's demurrer to this reply was overruled. (Record, pp. 57-58.)

The issues of law were upon the demurrers to the complaint and the demurrers to the second, third and eleventh paragraphs of answer and to the reply to the third paragraph of answer. The issue of law upon the complaint, was whether under sections 22, 23, and 24 of the Act of January 26, 1847, upon the facts stated that there was in the possession of the plaintiff in error at the time it accepted the general railroad law, a sum of money from the earnings of its railroad, in excess of the full sum invested in its shares of capital stock and 10 per centum per annum thereon until the time when the dividends declared had equaled such sum, increased by such per centum, and also of subsequent dividends on the sum so

invested at the rate of 15 per centum per annum, and the further facts also stated in the complaint as to the change in the length of plaintiff in error's railroad made with its consent by the Act of 1851, and of its acceptance of the general railroad law, and of the judgment rendered upon demurrer to the complaint in the suit begun in 1875, the defendant in error was entitled to recover such sum, upon demand for an accounting and payment made pursuant to the Act of March 4, 1897, before the bringing of the suit, and, if so, whether the legislation of 1897 was invoked in the complaint by the defendant in error to create an obligation upon the plaintiff in error, either independently of or in connection with the provisions of the Act of January 26, 1847, to pay such sum to the defendant in error, and in that case, whether such legislation was in violation of the constitution of the United States. The issue of law upon the second paragraph of the answer was whether under the facts stated therein, that by the act of the general assembly of the state of Indiana, approved January 20th, 1851, which had been accepted and adopted by the plaintiff in error, the railroad, provided to be constructed by the act of January 26th, 1847, was terminated at Indianapolis, Indiana, instead of Richmond, Indiana, and had so remained ever since, that plaintiff in error had constructed, owned and operated only that portion of the railroad authorized by its charter, which lies between Indianapolis and the Illinois state line, constituted a defense to the cause of action stated in the complaint, and if so, whether the

defendant in error was attempting to deprive the plaintiff of such defense by invoking the legislation of 1897, and in that case, whether such legislation was invalid as being in violation of the constitution of the United States; the allegation in said paragraph that at the time the general railroad law of 1852 was accepted by plaintiff in error, it was not, nor is it now, indebted in any way to the state of Indiana for any of the profits made by it in the operation of its railroad, nor to the state of Indiana, nor to the treasurer of said state, nor to the common schools thereof in any sum whatever, being not well pleaded, as it was provable under the general denial contained in the first paragraph of the answer.

The issues of law decided against the plaintiff in error, were: That the obligation sought to be enforced, was created by the Act of January 26, 1847; that the Act of January 20, 1851, enacted at the instance of the defendant and accepted by it, amending the Act of January 26, 1847, so as to permit the defendant to construct its railroad from Indianapolis to the Illinois state line only, instead of from Richmond to the Illinois state line, and under which it had constructed only that part of the line so permitted to be constructed, did not relieve it of such obligation; that the acceptance of the general railroad law by plaintiff in error, did not extinguish such obligation; that the judgment in the former action, in favor of the plaintiff in error, upon demurrer to the complaint, which did not aver that a demand had been made before the bringing of the suit, for an accounting and payment of

the moneys sued for, when, in fact, no such demand had been either authorized or made before the bringing of the suit, was not an adjudication which would bar the pending action brought for the recovery of the same moneys, after a demand for an accounting and payment had been authorized and made, and in which that fact was averred; and finally that such obligation was not impaired by the Act of March 4, 1897, or any vested property or contract right of the plaintiff in error invaded by said act, by which the attorney-general was authorized to demand an accounting and payment of any sum of money owing by virtue of such obligation.

The issues of law in so far as they involved the assertion by defendant in error, if there was any such assertion, that the legislation of 1897 was or could be invoked to create an obligation not created by the Act of January 26, 1847, and existing at the time such act was surrendered by acceptance of the general railroad law, or to impair the obligations created by such act, or to deprive plaintiff in error of any vested property or contract rights, were in every instance decided in favor of the plaintiff in error both by the trial court, and the supreme court of the state.

ARGUMENT.

THE JUDGMENT AGAINST THE PLAINTIFF IN ERROR DOES NOT DEPEND IN ANY RESPECT UPON THE DENIAL TO PLAINTIFF IN ERROR OF ANY RIGHT SECURED TO HIM BY THE CONSTITUTION OF THE UNITED STATES, AND NO FEDERAL QUESTION IS INVOLVED.

The jurisdiction of this court in the present case depends upon whether in the court below the defendant in error asserted the validity of the legislation by the general assembly of the state of Indiana, of 1897, and that the plaintiff denied such validity on the ground of its being repugnant to the constitution of the United States, and that the decision was in favor of its validity, or whether any right claimed under the constitution of the United States, and specially set up and claimed by the plaintiff in error, has been denied.

1 Compiled Statutes U. S. 1901, §709;
Duncan v. State of Mississippi, 152 U. S. 377;
De Saussure v. Gaillard, 125 U. S. 18;
Missouri v. Andriano, 138 U. S. 497;
McNulty v. The People, 149 U. S. 645.
Carothers v. Mayer, 164 U. S. 325;

It is only the federal question thus presented that can be reviewed in this court.

Ashley v. Ryan, 153 U. S. 436.

Where the case was decided in the court below on an independent ground, broad enough to maintain the judg-

ment, and not involving a federal question, this court will dismiss the writ of error without considering the federal question.

Beatty v. Benton, 135 U. S. 244;
Marrow v. Brinkley, 129 U. S. 178;
Hale v. Akers, 132 U. S. 554;
Eustis v. Bolles, 150 U. S. 361;
Costello v. McConnico, 168 U. S. 674;
Missouri Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

If merely the construction of state statutes is involved the writ of error will not lie.

Insurance Co. v. The Treasurer, 11 Wall. 204;

Nor will it lie to review the decision of the court below upon questions of fact.

Dower v. Richards, 151 U. S. 658;
Hedrick v. Atchison, T. & Santa Fe Ry. Co., 167 U. S. 673;
Egan v. Hart, 165 U. S. 188.

Nor to review decisions upon questions of the admission or rejection of evidence which does not bear directly upon some matter of a federal nature.

Cleveland, C., C. & St. L. R. Co. v. Backus, 154 U. S. 439;
Central Pac. Ry. Co. v. California, 162 U. S. 91.

Under these principles there is no federal question presented by the record.

There was at no stage of the case any claim or assertion by the defendant in error that the legislation of 1897 which the plaintiff in error contended, by its demurrer to the complaint, was the foundation of the contract obligation sought to be enforced by defendant in error, was in fact relied upon in the slightest degree as creating or in any way affecting such obligation. On the contrary the defendant in error set out in the complaint as the foundation of his right of action the Act of January 26, 1847, as containing the contract sued upon. It was made an exhibit as required by the code of practice in reference to written instruments which are the foundation of an action, or defense. The complaint in stating the obligation sought to be enforced referred in terms to the 23d section of the Act of 1847, in its original form, as containing such obligation, and in charging the breach of the obligation, it was averred to consist of the failure and refusal of the plaintiff to account for and pay to defendant in error, upon demand, a sum of money, being its surplus earnings remaining after an accounting upon the basis provided by that section, and which was required by that section to be paid to the treasurer of state. But even if there had been any claim or assertion by defendant in error of the validity of the legislation of 1897 and of rights claimed thereunder against the defendant in error, the decision of the court below, at the very inception of the proceedings, was against such claim and assertion, and in favor of the contention of the plaintiff that such legislation was invalid. The demurrer to the complaint filed by the defendant in

error, was special as well as general. It not only proceeded upon the ground that the complaint did not state facts sufficient to constitute a cause of action, but charged specifically that no cause of action was stated except one which depended for the contract obligation sought to be enforced, upon the legislation of 1897, and that such legislation was invalid because it was in violation of the constitution of the United States. The trial court held in ruling on the demurrer, and by such ruling established as the law of the case, which was adhered to in all subsequent proceedings in that court, and affirmed by the judgment of the supreme court of the state, that the legislation of 1897 in so far as it attempted, if it did attempt, to impose any obligation upon plaintiff in error that did not exist under the special charter of 1847, or to deprive plaintiff in error of any vested property or contract rights relating to the subject matter in suit, was void as being repugnant to the constitution of the United States and that the only cause of action stated in the complaint was the one created by the 23d section of the Act of 1847.

The question was presented by the demurrer precisely as if the complaint had been in two paragraphs, each attempting to state a distinct cause of action; one declaring upon the charter of 1847 in its original form, without in any way referring to the legislation of 1847, except to the Act of March 4, which provided for the making of a demand for an accounting and payment, and only relying upon that act for that single purpose; and the other declaring upon the legislation of 1897 as not only provid-

ing for a demand for accounting and payment, but as creating, or at least adding to, the obligation sought to be enforced.

To such a first paragraph only the general cause of demurrer that it did not state facts sufficient to constitute a cause of action, could be addressed. Its sufficiency as stating a cause of action would not be attacked or drawn in question by the special ground of demurrer that the cause of action depended upon the legislation of 1897, unless it could be said that the Act of March 4, which only related to the remedy, also affected the obligation sought to be enforced, and was relied upon by defendant in error for that purpose. The overruling of the demurrer would not assert as against the demurrant the validity of such legislation for any purpose whatever. It would not be involved in the decision, which would simply hold that the paragraph of complaint stated a cause of action wholly governed by the statutes of the State, and the principles of general jurisprudence, and upon the authority of the cases cited, the claim that any federal question had been decided adversely to the demurrant could not be sustained. But as to such other paragraph of complaint the special ground of demurrer that it asserted the validity of legislation which was invalid under the constitution of the United States would apply in full force, and a federal question would be presented, the decision of which could not be avoided because, unless the legislation was valid, the paragraph would not state a cause of action. The complainant's right of action would depend, as to that para-

graph, upon the validity of such legislation, which he was asserting and the defendant denying. If the demurrer were overruled and that ruling affirmed by the state supreme court, a federal question, reviewable in this court would undoubtedly be presented, but on the other hand, if the demurrer were sustained and that ruling affirmed in the state supreme court, the result would be that the cause of action attempted to be stated would be eliminated from the case, and the judgment rendered therein against the defendant would be based exclusively upon the other paragraph, and it could not be said that any federal question was presented. Now in this case, so far as the issue of law raised and decided upon the demurrer to the complaint is concerned, the result of the rulings of the trial court and state supreme court is precisely the same, even if it should be conceded, as it is not, that there is in the complaint an attempt by defendant in error to assert an obligation or right created or affected by the legislation of 1897. The trial court and state supreme court both ruled that the legislation of 1897 was invalid for any such purpose. The federal question was thus at the outset decided in favor of the plaintiff in error, and the defendant in error was compelled in all further proceedings in the action to rely for its sole foundation upon the contract obligation, if any, imposed upon the plaintiff in error by the Act of 1847 in its original form.

The trial court and state supreme court in holding, as they did upon the general ground of demurrer, that the facts stated in the complaint constituted a cause of action

under the Act of 1847; that the obligation created by that act was not affected by the change in the length of plaintiff in error's railroad, authorized, at its solicitation, by the Act of January 20, 1851, nor extinguished by the acceptance in 1873 of the general railroad law, as to rights acquired prior to such acceptance, did nothing more than to construe the statutes of the state and determine their scope and effect—and the rulings so made, and judgment entered against plaintiff in error as the result thereof, present no federal question and are not reviewable in this court. A federal question is not presented simply because the party litigant asserts that the claim made against him by his adversary depends upon the assertion, or involves the denial, of some right secured to him by the constitution or laws of the United States. The record must affirmatively show such to be the fact.

Crowell v. Randall, 10 Pet. 368.

The assignment of errors, asserting the existence and decision against the plaintiff in error, of a federal question, counts for nothing, unless from the record itself the fact appears.

Fowler v. Lamson, 164 U. S. 252;
Clarke v. McDade, 165 U. S. 168;
Walker v. Villavaso, 6 Wall. 124.

It is, however, shown by the record in this case, in addition to what the complaint itself shows as to its proceeding exclusively upon an obligation created by the Act of 1847, in its original form, and to the fact that by the ruling on the demurrer the defendant was confined to this

theory, that the defendant in error, upon the argument of the demurrer, stated its contention to be that the obligation sought to be enforced was one created by section 23 of the Act of 1847, and made no claim that such obligation was created by, or depended to any extent upon, the legislation of 1897.

See opinion of the trial court (record, pp. 37-38), where the contentions of both parties are stated.

The next issue of law determined in the case was by the ruling of the trial court in sustaining the demurrer of defendant in error to the second paragraph of answer. Not a single question was presented by this answer of a federal character. It was bad upon demurrer for the reason, if no other, that it stated only one fact which did not appear in the complaint, and that was its denial that plaintiff in error was indebted to the defendant in error in any sum when in 1873 it accepted the general railroad law and surrendered its special charter. The general denial had already been pleaded as the first paragraph of answer. The complaint averred that the moneys sued for were owing at and before the acceptance of the general railroad law, and under the first paragraph of answer, that, as well as all other material allegations of the complaint, was denied. So that the denial contained in the second paragraph of answer was unnecessary and, so far as it was concerned, the sustaining of the demurrer worked no harm to defendant in error, and was not error.

Board v. State, ex rel., 148 Ind. 675;
Watson v. Lecklider, 147 Ind. 395;
Jeffersonville, etc., Co. v. Riter, 146 Ind. 521.

The only other matters stated in the answer were already stated in the complaint, to wit: that by the Act of January 20, 1851, plaintiff in error had been permitted to shorten its railroad by leaving out the part between Indianapolis and Richmond, and had only constructed and operated the remaining part, and that on the 17th of January 1873, plaintiff in error had accepted the general railroad law and surrendered its special charter. It was charged that the effect of these things—either or both—was to release and extinguish the contract obligation imposed by the 23d section of the special charter, and the answer then proceeded to aver that the defendant in error by its complaint was asserting a right of action created by the legislation of 1897. Now it is too plain for argument that the nature of the right asserted by the defendant in error in the complaint must be determined solely by reference to the complaint itself. This the court had been challenged to do by the demurrer which had been filed to the complaint, and upon that demurrer it had been determined by the trial court, rightly, as afterwards decided by the state supreme court in affirming the ruling, not only that the contract obligation under the Act of 1847 had not been released or extinguished by reason of the matters stated in the answer, and which as we have seen were stated in the complaint, but that the defendant in error was not asserting that such had not been the effect by reason of anything contained in the legislation of 1897; so that the answer, in so far as it presents a federal question, only does so upon the theory that the plaintiff in error

has the right, in spite of defendant in error's disclaimer of any reliance upon the legislation of 1897, and in spite of the decision of the court that defendant in error did not, and could not, rely upon such legislation, to put the defendant in error in the position of so relying, by alleging the fact in a paragraph of answer. If this is permissible we submit that there is no case in which the judgment defendant may not make up the record so as to present a federal question for review in this court.

There was clearly no federal question determined by the ruling upon the demurrer to this paragraph of answer. It simply required the court to again determine by reference to the complaint, what was the source of the obligation the defendant in error was seeking to enforce, and finding, as it already had, that it was not the legislation of 1897, but the Act of 1847, to construe the Act of January 20, 1851, and the provisions of the general railroad law of 1852, and especially of its 36th section, to determine whether the acceptance by plaintiff in error of the permission given by the Act of 1851 to shorten its railroad, and by the other Act to abandon the Act of 1847, released or extinguished existing obligations incurred under the latter act. In doing this the trial court and state supreme court were, in one view, simply construing a pleading, and in the other, state statutes, and in both cases applying principles of general jurisprudence not involving in the slightest degree any question of federal law.

The issue of law presented by the demurrer to the third paragraph of the answer was decided in favor of plaintiff

in error. The demurrer was overruled, and this ruling was not reversed by the supreme court of the state. The ruling was in harmony with the ruling upon the demurrer to the complaint, in which it was broadly held that no effect could be given to any of the legislation of 1897 to create, add to, or alter in any respect the obligations, if any, imposed upon plaintiff in error by the charter of 1847, or to deprive the plaintiff in error of any property or contract rights vested in him prior to the enactment of such legislation. The answer pleaded the judgment in the suit brought in 1875 as an adjudication of the cause of action stated in the pending complaint. It averred that the causes of action in both cases were the same, and that the judgment was upon the merits. It did not set out the complaint in the former action, or in any way aver or show that it did not allege that a demand had been made for an accounting and payment of the moneys sued for before the suit was brought. The court held that it was a good answer, and, as it went further and averred that the defendant in error was relying upon the legislation of 1897 to deprive plaintiff in error of the benefit of the judgment as a defense, it was in effect a holding that the judgment, admitted by the demurrer to be such as the answer alleged it to be, gave the plaintiff in error a vested interest which could not be affected by the legislation of 1897, and that in its application to such judgment, such legislation was invalid. The federal question presented was therefore decided in favor of plaintiff in error, and, of course, is not reviewable at its instance in this or any other court.

But plaintiff in error insists that the federal question presented by this paragraph of answer was decided adversely when its demurrer to the reply was overruled. The reply set out a copy of the complaint in the suit begun in 1875 showing that it contained no averment that a demand had been made for an accounting and payment of the moneys sued for, before the suit was brought, and in addition, it was alleged that the general assembly had not authorized such demand to be made until after the suit was decided, and that in fact no demand had been made before the suit was begun. It went further and disclaimed any reliance upon the legislation of 1897 to deprive the plaintiff in error of any benefit he was entitled to under said judgment, and asserted that only the Act of March 4 was relied upon for any purpose, and that only as providing for the making of a demand. The overruling of the demurrer decided nothing but that the right of action to recover moneys claimed to be owing under the Act of 1847 did not mature until a demand was made, and that a judgment rendered upon sustaining a demurrer to a complaint for the recovery of such moneys, which did not aver or show a demand, was not a bar to another action in which a demand was averred. In the first stage the construction of the Act of 1847 was involved, and this did not present a federal question, and in the next stage the scope and effect of a judgment as an estoppel was involved. And again no federal question was presented as this court has expressly held.

California v. Hollady, 159 U. S. 674.

Did the Act of March 4, 1897, in providing that the attorney-general should demand of plaintiff in error an accounting and payment of the moneys claimed to be owing to the state, under the Act of 1847, add anything to the pre-existing obligation of plaintiff in error, or was it merely declaratory of the common law right of defendant in error to make the demand to which it related, or remedial in its nature?

It needs no argument or citation of authorities to show that if it was merely declaratory of the common law, it did not deprive plaintiff in error of any rights secured to him by the constitution of the United States, nor if it was merely remedial, that it did not impair the contract obligation imposed upon plaintiff in error by the Act of 1847, or deprive him of any vested property right, or take his property without due process of law, in violation of the constitution of the United States. There is no vested right in a remedy. The remedy for the enforcement of a contract is not part of the obligation of the contract, protected from impairment by subsequent legislation, except to the extent that on the one hand the existing remedies may not be taken away or so changed as not to leave the obligee a reasonably efficient remedy, or on the other hand so increased as to give the obligee more than the contract contemplates. Within these limits state legislation relating to matters of remedy does not impair the obligations of contracts.

Cooley, Constitutional Limitations, 346-357.

This author says, at page 356, that where "a legal impediment exists to the enforcement of a contract which

parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it."

In the present case the 23d section of the Act of 1847 requires that there must be a demand for an accounting before the right of action has accrued. It is provided that reports of expenditures, expenses and profits shall be made when requested by the general assembly, and until such request is made, plainly an action to recover the moneys provided to be accounted for and paid, could not be maintained. The contract itself contemplates that the request may be made at the pleasure of the legislature, and as it can only express its will by legislation, and act by agents, it necessarily follows that the right of the legislature to pass an act providing for the making of a demand, and designating the officer or agent by whom it shall be made, is a part of the contract obligation, and that such an act does not impair, but perfects and enforces such obligation.

Ogden v. Saunders, 12 Wheat. 213;
Been v. Haughton, 9 Peters 329;
Tennessee v. Speed, 96 U. S. 69.

In Chicago, etc., R. Co. v. State, ex rel. 153 Ind. 135, the state had failed in a former suit to recover a franchise tax imposed upon the filing by corporations of their articles of association or agreements of consolidation as a condition precedent to incorporation, in the case of domestic corporations, and to the right to do business

within the state in the case of foreign corporations, and to the taking effect of railroad consolidations made under existing laws of the state, upon the ground that the consolidation agreement in question had not in fact been filed before the suit was brought. Thereupon an act was passed requiring all consolidation agreements to be filed, and providing for the bringing of suit to enforce such filing and to recover the franchise tax. To a suit so brought it was objected that the act was unconstitutional as impairing the contract right to consolidate, and that the judgment in the former suit was a bar to the prosecution of the second suit, but it was held that the act related only to the remedy, and that the judgment in the former action was not a bar to the second.

On the point as to the validity of the Act of March 4, 1897, the case is directly in point in the present case.

It is, however, contended by counsel for plaintiff in error that a federal question is presented by the rulings of the court below which we have so far considered, because in every case where it is claimed a federal question is involved, and has been decided adversely to the plaintiff in error, it is the right and duty of this court to pass upon every element entering into the question, including the construction of the prior state legislation the obligation of which as a contract it is claimed has been impaired by subsequent legislation, in order to determine for itself the obligation of the pre-existing contract, and thus be enabled to see whether the subsequent legislation does impair such obligation; and that upon this inquiry, this court is not to be concluded by the decision of the state court by which

the contract is so construed as that its obligation is not impaired by the subsequent legislation. In support of this contention, Citizens Bank v. Parker, 192 U. S. 73-85, and Yazoo & Mississippi R. R. Co. v. Adams, 180 U. S. 41-44, are cited.

Neither of these case is applicable to the case at bar. The fundamental distinction, which is ignored by plaintiff in error, is that in Bank v. Parker, the right to collect the license tax, for the recovery of which the suit against the bank was brought, had no existence except as it was created by the later act, which it was claimed deprived the plaintiff in error of an immunity from taxation secured to it by the prior act under which it was incorporated. It was the later act that was sued upon and asserted by the defendant in error as the foundation of its right to collect the tax. Without that act the defendant in error had no standing in court at all. It asserted the validity of the act. The plaintiff in error set up as its defense its alleged contract right, by virtue of its charter, to be exempt from payment of the tax, and asserted that the act relied upon by the defendant in error was invalid under the constitution as impairing the obligation of the contract. The trial court sustained the defense and held that the action could not be maintained as the act upon which it was founded was invalid. The state supreme court reversed this decision, holding that the charter of the plaintiff in error only exempted it from property taxation and not from license taxation. It was upon this state of facts that it was held by this court that it was not concluded by the construction thus placed upon the charter contract, and certainly no

other decision could have been made unless the court was prepared to abdicate its function of reviewing the decisions of the state courts upon federal questions.

But in the case at bar the defendant in error does not declare upon the acts which are claimed to impair the obligation of the contract created by the charter of 1847. It declares upon that charter itself, and at every stage of the case has disclaimed, instead of asserted, the validity of the legislation of 1897 to create any right in its favor, or impose any new obligation upon the plaintiff in error, and the state courts, from the inception of the litigation, have treated the case as proceeding upon this theory, and have held the legislation of 1897 to be invalid. It is the plaintiff in error, and not the defendant, that brings this subsequent legislation into the case. If it had not done so it would not have been heard of.

In such a case this court has no basis for entering upon the question of the construction of the Act of 1847, the conditions precedent to its right to review being that the judgment rendered against the plaintiff in error depends upon the validity of an act relied upon by the defendant in error as being valid, and asserted by the plaintiff in error to be invalid because it violates the constitution of the United States in depriving it of rights secured thereby; and that such act has been held to be valid by the state court. In the case at bar every element essential to the jurisdiction of this court is absent. In the case of Bank v. Parker every such element was present.

In Yazoo, etc., R. Co. v. Adams, 180 U. S. 41, it is said that there is no doubt of the general proposition that where a contract is alleged to have been impaired by sub-

sequent legislation, this court will put its own construction upon the contract, though it may differ from that of the supreme court of the state; but by this it was not meant that the jurisdiction of this court could be invoked where the subsequent legislation was not relied upon by the defendant in error, either to create a right in himself against the plaintiff in error, or to deprive the latter of rights that he would otherwise have, and where the defendant in error and the state courts have in all stages of the controversy recognized the invalidity of the subsequent legislation for any such purpose.

In that case the court declined to take jurisdiction, holding that "If jurisdiction in this case is sustained, it results that whenever a state court gives a certain construction to a contract, it is our duty to search the subsequent statutes and to find out whether there be one which, under a different construction of the contract, may be held to impair it. We must decline the obligation."

So in this case the fact that the plaintiff in error, in its anxiety to get to this court, has itself searched for subsequent legislation which, under a different construction of the act of 1847 than that given to it by the state court, may be held to impair the obligation of that act, does not confer jurisdiction upon this court to construe the act of 1847, unless the defendant in error has relied upon such subsequent legislation as creating its cause of action, or as depriving the plaintiff of a defense, and unless it has been given such effect by the state court.

This court has very properly held that it is not bound to pursue phantoms.

It is further insisted by plaintiff in error that the act of March 4, 1897, was given effect by the state supreme court to create a right of action, because it is said that it was held by that court that there was no right of action except such as was created by that act. Certain extracts from the opinion of the court are quoted as sustaining the contention. The fact is that every expression so quoted was used in a connection which unmistakably shows that what the court had in mind to say, and, in fact, did say, was that until the making of the demand for an accounting and payment was authorized by the act of March 4, and until the demand so authorized had actually been made, the pre-existing cause of action in favor of defendant in error under the provisions of the act of 1847 had not matured. All that was said was in reference to the proposition that the suit begun in 1875 was not a bar to the present action, because it was prematurely brought in the absence of a demand authorized and made, whereas the present action was timely, inasmuch as it was instituted after demand had been authorized and made.

There is not an intimation in the opinion of the court below that the legislation of 1897 had any effect to create any new obligation, or deprive plaintiff in error of any vested right. It was held to be invalid in every respect except in so far as it related to the remedy for the enforcement of the contract of 1847.

It is also insisted that effect was given to the legislation of 1897 in determining the elements that entered into the accounting made by the trial court which resulted in the judgment that was affirmed by the state supreme court.

It is apparent that there is nothing in this contention. The trial court put its own construction upon the act of 1847 as to its requirements in reference to the accounting, and applied in making the accounting, the construction it determined to be the true one. Neither the defendant in error, nor the court, asserted that the legislation of 1897 had any validity as affecting the construction of the act of 1847 in this respect, and for the reasons already given no federal question arises in this connection.

We have so far presented the case in the belief that it does not present any substantial federal question, and that the motion filed by defendant in error to dismiss or affirm for that reason should be sustained by the court. We ask that what is said in this brief be considered in connection with the brief filed in support of the motion to dismiss or affirm.

If, however, the court should be of opinion that a federal question is so involved and presented as to make it the duty of the court to review the decision of the court below as to the construction of the legislation involved, antecedent to that of 1897, in order to determine whether the judgment of the court depends upon the legislation of 1897, to such an extent that the obligation of the contract of 1847 has been impaired, or the plaintiff in error deprived of any vested property or contract rights, then we respectfully submit in support of the rulings of the court below to which objection is made in plaintiff in error's brief, the following argument and authorities, upon which, in connection with the reasons and authorities contained in the opinion of the court below, we ask that the judgment of the court below be affirmed.

REGULATION OF TOLLS BY THE LEGISLATURE WAS NOT A CONDITION PRECEDENT TO THE OBLIGATION OF PLAINTIFF IN ERROR TO PAY ITS SURPLUS EARNINGS TO THE TREASURER OF STATE FOR THE USE OF THE COMMON SCHOOLS. SECTION 23 OF THE ACT OF 1847 LIMITED THE AMOUNT THAT PLAINTIFF IN ERROR SHOULD EVER APPROPRIATE IN PROFITS TO ITS OWN USE:

(a) TO THE REPAYMENT OF THE FULL SUM INVESTED, AND TEN PER CENTUM THEREON;

(b) AND THEREAFTER, TO FIFTEEN PER CENTUM PER ANNUM THEREON.

WHEN THESE SUMS WERE REALIZED, THE SURPLUS, IF ANY, AFTER THE PAYMENT OF THE EXPENSES, AND RESERVING SUCH PROPORTION AS MIGHT BE NECESSARY FOR FUTURE CONTINGENCIES, WAS PAYABLE TO THE TREASURER OF STATE FOR THE USE OF COMMON SCHOOLS, WITHOUT REFERENCE TO WHETHER THE STATE HAD TAKEN ACTION TO REGULATE THE TOLLS AND FREIGHTS OF THE COMPANY.

The cause of action alleged in the complaint arises on sections 22, 23 and 24 of the act of 1847, which we denominate plaintiff in error's charter. We here reproduce those sections, together with section 35, which, although it was repealed in 1848, is material to be considered in construing the other sections.

> Sec. 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road, or any part thereof, as shall be for the interest of said company, and to change, lower or raise, at pleasure: Provided, That the rates established

from time to time shall be posted in some conspicuous place or places on said road.

Sec. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested, and ten per cent. per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

Sec. 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper.

* * * * * * *

Sec. 35. The corporation shall cause to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses, and also a fair account of the tolls received; and the state shall have the right to purchase the stock of said company at any time after twenty-five years, by paying to said corporation a sum of money which, together with the tolls received, shall equal the cost and expenses of said railroad as aforesaid, with an interest of ten per centum per annum; and the books of said company shall always be open for the inspection of any agent of the state, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and accounts to said agent, upon request made to the president, all powers granted by this act shall cease. (Repealed.)

This action, then, is based upon the rights reserved to the state by sections 22, 23 and 24, as above set forth, and the contention here is, that the facts stated show a good cause of action under this statute; plaintiff in error contending that section 23 gave to the state no right to any of the profits of the corporation which might accrue prior to the regulation of tolls and freights by the legislature, and, the legislature never having regulated the tolls and freights, the time never arrived when the corporation was bound to pay any sum to the state for the benefit of common schools.

Our contention is, that section 23 limited the amount that the company should ever appropriate to its own use in profits:

1. To the full amount invested, and ten per centum per annum thereon, and thereafter, to fifteen per centum per annum upon the capital stock; and

2. That when they had so realized, out of the profits, the full sum invested, and ten per centum per annum thereon, the surplus profits, after the payment of fifteen per centum per annum upon the capital invested, and the expenses, and after reserving the necessary sum for future contingencies, should be paid to the treasurer of state for the use of the common schools.

CONSTRUCTION OF THE STATUTE.

The judicial construction of the statute is but a process for ascertaining the intention of the legislature. In looking for this intention we must consider, first, the conditions existing at the time. A railroad was a novelty. The cost of its construction and operation and the amount of business which would come to it were unknown. As an investment it might be highly profitable or very unprofitable. It was an object to the public to have it built; it was an object to the promoters to build it, provided they could make money out of it. Such a law always represents a bargain made between the state and the corporators.

We are bound to assume that the legislature was intending to promote the public interest in a true, large and permanent sense. The immediate want was a railroad. To get it was the first *desideratum;* to get it on terms presently and permanently advantageous to the state and people was the problem.

In such a case there are four interests to be considered, viz.: Those of the public in securing the railroad, or other improvement; those of the corporators in the matter of profits out of the enterprise; those of the people in the matter of charges for services rendered; and those of the state in the matter of compensation for franchise bestowed.

How to promote all these interests most equitably and advantageously is a matter to be solved in view of conditions existing. The enterprise may be so risky that men will not touch it without subsidies; it may be so inviting that they will bid fabulous sums for the franchise.

The legislation of Indiana, from its earliest history, is evidence of a determination on the part of the people to foster, by every means in their power, the development of highways of trade and commerce. By 1835 the Wabash & Erie canal was well under way, and in operation nearly or quite all the distance from the Ohio state line to Lafayette. In 1836 the great internal improvement act was passed, authorizing a number of public works, and among them a railroad from Madison to Lafayette, by way of Columbus, Indianapolis and Crawfordsville.

This was to connect the Wabash & Erie canal and the Ohio river. For its construction $1,300,000 was appropriated by the bill. It was in contemplation that the state should build, own and operate the road.

By 1842 it was evident that the state had undertaken more than could be accomplished. The act of that year contained a general offer to turn over the interest of the

state in its unfinished works to private corporations that would undertake to complete them. (Acts 1842, p. 3.) The Madison & Indianapolis railroad company was organized during the same year, and undertook the completion of that road from Madison to Indianapolis, and the work was surrendered to the company by the state in 1843. (Directors' Report, September 28, 1844, Indiana Pamphlets, vol. 1.)

The president's report in February, 1846, showed the road to be still incomplete, lacking thirty miles of reaching Indianapolis. (Ib.) It was probably completed during that year, and the act here under consideration passed a few months later. Ten years had elapsed since the work was undertaken and the appropriation made for its construction. Such had been the experience of the state in obtaining its first railroad.

Coincidently with these events the state formally gave up its internal improvement scheme, compromised its debts, and by the acts of 1846-7 turned the Wabash & Erie canal over to its creditors.

But the people were by no means disposed to give up their efforts to obtain the improvements, and the legislature set about to secure them by liberal inducements to private corporations. The act incorporating the plaintiff in error was one of a number passed with that end in view.

The most cursory reading of the act discloses that it had a purpose beyond the mere organization of a railroad company. It was framed with a view to offer such in-

ducements to the corporators to accept the charter and build the road as would afford the highest assurance of the accomplishment of those results. At the same time, it contained provisions manifestly intended to protect the people from extortion, limit the profits to be enjoyed by the company, and turn some revenue into the school fund.

For the purpose of construction we must consider the statute as it was enacted, including section thirty-five, afterwards repealed. It is to the act as it was passed, and its possible and probable operation in the various contingencies of the future which might arise, and which we may suppose the legislature had in mind, that we must look for the intention of the lawmakers.

It provided first for extremely liberal recompense to the stockholders for the cost and hazard of the undertaking. They were given absolute control of the corporation and its franchises, with power to fix tolls and charges at discretion until they had received a return of their capital and ten per cent. per annum thereon, unless, after the expiration of twenty-five years, the state should elect to purchase all the stock by paying what should at the time remain unpaid, if anything, of the capital and ten per cent. per annum.

Not only that, but the return to the stockholders of their capital and ten per cent. was not to extinguish their stock; but they were to be entitled to receive, after that, such dividends as the road would earn, not exceeding fifteen per cent. per annum on the capital.

These conditions, taken together, secured to the stockholders to the extent prescribed, in preference to any interest of the public in low charges, or any compensation to the state for the franchise, the benefit of all possible profits in the building and operation of the road.

The enterprise might prove highly profitable. The history of the times indicates that men generally took a sanguine view of the future, and especially of the future value of railroad property. It might be possible to obtain a return of the capital and ten per cent. in ten or fifteen years. The right of the company to obtain it as soon as possible was unquestionable. And the right to receive fifteen per cent. in dividends, after that point had been reached, until the expiration of twenty-five years, was also absolute.

The legal rate of interest at that time was six per cent. Certainly the law went to the limit of liberality in providing guarantees and inducements for the benefit of the stockholders.

We may consider next the provisions made for the interests of the people in the matter of charges.

The first was that in section thirty-five, that at the end of twenty-five years the state should have the right, at its option, to buy the stock. It would then have the subject of rates entirely within its own control. It could trust itself, and the people could trust it to do justice.

The second was, that in case the state did not see fit to buy the road, the legislature should have full control of rates after the stockholders had received, in dividends,

their capital and ten per cent. per annum, subject only to the right of the stockholders to receive dividends at the rate of not less than fifteen per cent. per annum.

The provision for compensation to the state for the franchise granted, was in the power reserved to regulate rates after the stockholders had received their capital and ten per cent. Whatever the road could make over fifteen per cent. on its cost, at rates prescribed by the legislature, was to go to the school fund.

What would come of all this no one could tell. It was to the manifest interest of the stockholders to get back their capital and ten per cent. as soon as possible, and begin the enjoyment of dividends at fifteen per cent. It was assumable that the company would fix its rates of tolls and freights with a view to making the largest possible amount of money out of the public, and that this might exceed fifteen per cent. on the cost of the road by an unknown amount.

The time when occasion would arise, if ever, for the state to exercise the power of regulation reserved, was indefinitely far away in the future. The act contained no limitation upon the life of the corporation. By its terms the company was allowed five years within which to begin work, and fifteen years from its commencement within which to finish the road. The company was given full control until the repayment of its cost and ten per cent. per annum in dividends. So that it was quite within the contemplation of the act that fifty years might elapse before the state would have any occasion to act in relation to the regulation of tolls and freights.

When it came, it would be for the legislature to judge whether to exercise its power of regulation with a view to keeping down rates, or with a view to obtaining revenue for the school fund. There is a vaguely definable standard of reasonable charges for railroad freights and fares, to which both the company and the state would be bound to give some heed. What that standard would be, forty or fifty years later, was not foreseeable in 1847. To exceed that rate for the sake of revenue would not only be an act of injustice on the part of the state, but a policy likely to defeat its own purpose.

On the other hand, there could be no good reason why the patrons of this railroad should pay less than a reasonable compensation for the use of it. In such a matter as that, the people of the state ought all to be treated alike, as nearly as possible. There would be gross injustice in a law providing that the farmers in one direction from Indianapolis should have less rates to the city on their produce than those in another direction. It must be taken as assumed in the act that the legislature, if it ever enacted any regulation of tolls, would do so with reference to the general and prevailing charges for such service in the state and country.

Upon the basis of such rates the contemplated railroad might never earn, net, fifteen per cent. per annum on the capital invested in it; or it might earn twice that per cent., or more at one time, and less at another.

There was, therefore, manifest wisdom in leaving open, as far as possible, the question of what the state would

do in the exercise of its power of regulation. And it *was* left wide open, with the single exception that the company should be entitled to retain out of the net profits fifteen per cent. per annum, with a reserve for contingencies.

The language of the act is, that "The legislature may so regulate the tolls and freights that not more than fifteen per cent. per annum shall be divided on the capital employed." The state was at liberty to regulate, or not, when the time came. We can hardly say that the word "may" was intended to be mandatory, as it sometimes is, where it is used to confer a power, in the exercise of which others are interested. The reasons for leaving the matter thus wholly at the will of the legislature are obvious. It was not known what the profits of the company's business would be. They might be insufficient to pay fifteen per cent. on the capital employed. The company could be depended upon to make all it could out of the property. Until it could make the fifteen per cent. which it was entitled to receive and retain, there was no occasion for the legislature to interfere. That condition might be long in coming, and come at last, or it might never come.

The possibility of compensation to the state for the franchise lay in the fact that the road might be able to earn, at some time in the future, after paying the stockholders their capital and ten per cent., a surplus over the profit necessary to pay dividends at fifteen per cent., while yet operating at reasonable rates of fares and freights.

All the provisions of the act point to that possibility

as a thing present in the mind of the legislature. It was to save for the state the benefit of that possibility that final, discretionary and untrammeled control of tolls and freights was reserved to the legislature.

It was to that end that the grant of the franchise was not absolute, but revocable at the will of the state after twenty-five years. It was, in effect, permission to use the franchise for twenty-five years, with right in the state to resume its own at the end of that time.

If, when that time arrived, the stockholders had already received their capital and interest in dividends, there would be nothing for the state to pay. It would be entitled to call on the stockholders to assign their stock to it as its own. Their interest in the property would be at an end.

If, after that, the state should see fit to let them remain in possession of the road and receive their dividends, it would be by mere sufferance. They would be mere bailees of the stock. Their management of the road would be as agents or servants of the state.

What is the explanation of these singular provisions? Why was the company given such arbitrary and unlimited power to begin with, and none at all, except to be mere custodian of the property, at the end? Was it merely to protect the people in the matter of rates?

They would never need that protection more than right then. They were as poor then as they ever expected to be. And yet, the act turned them over to the tender mercies of the company for twenty-five years, or until the stockholders had received back their capital and interest, if that should happen sooner.

Why did the legislators thus deal with their constituents? It was not a natural thing to do. The voter of today is the man toward whom a public officer's sympathies go out most actively; not the citizen of half a century later.

The key to it all is simple enough. The legislature was not free to do just as it would. It had to do the best it could. The scheme for public improvements by the state had broken down. Private capital must be enlisted by liberal offers. And the best offer to make was one that would promise the investors the speediest return of their money, and to that end give them the most absolute control of the property out of which it was to be made.

Only when that had been accomplished could other interests be provided for. The first of these was the interest of the people in reasonable charges; the next, recompense to the state for the grant of the franchise.

These considerations seem to us to develop the intention of the legislature along clear lines. Whatever powers it reserved to itself were to be exercised for the public good, and the good of the whole public when the time came. It was intending to do justice alike to stockholders, shippers, travelers, consumers and school children. It was intending to turn some profit from the franchise into the public treasury, if it could do so consistently with this justice.

It was impossible to do that at once. It was not certain that it could ever be done. The time might never come when the road could pay the profit to its builders which must be authorized in their favor to induce them to undertake it, do business for the people at fair rates, and pay a surplus into the treasury.

On the other hand, it might come. Conditions were conceivable and not impossible, in which, after doing justice alike to stockholders and patrons, there would be a surplus of profits. To make sure of them in recompense for the franchise was the ultimate, underlying intent of the provisions of the act which we have been considering. The motive which prompted them was not benefit to the stockholders, nor cheap travel and transportation, but revenue for the schools—revenue not to be realized immediately—perhaps never—but not to be lost if the conditions of its realization should arise.

To get the road was the first thing. To get even a promise of this the charter must be acceptable to the stockholders. We are to presume that this was the subject of negotiation between the promoters and the legislature, or its committee. Such provisions as were necessary to secure them in their outlay must necessarily be embodied in positive and unmistakable terms in the act. Investors want to know their rights before they pay their money. Hence the complete surrender by the state of all power of regulation or control over the company until its stockholders had taken back their money and interest.

All beyond this was in the dark. With these conditions to be met, time only would show what would be possible in the way of rates to the people, or revenue to the state. All that could be done was to vest in the legislature power to deal with the questions when they came.

Through all these provisions one intent stands out clearest and most unmistakable of all. It is that the company

shall never, in any event, appropriate to its own use in profits more than fifteen per cent. per annum on the capital invested.

To this main intent (next to that to secure the road) all lesser intents were contributory. It was for this that the company was empowered to take back its capital as quickly as possible. It was for this that the directors were commanded, in section 24, to declare dividends. It was not necessary to put that authority in the imperative mood to secure the ordinary performance of that ordinary duty. It was to secure the reimbursement of the stockholders by preventing the expenditure of the earnings in other ways, and so to bring about the contingency upon which the state was to resume its lawful sovereignty over the corporation in the right to regulate its tolls and freights.

The irrevocable right conferred to take fifteen per cent. after reimbursement of capital negatives a right to take more. The whole scheme—the provisions for quick return of capital at whatever hardship to the public in the way of charges; the indefeasible right to fifteen per cent. as long as the road should remain in the hands of the stockholders, all import that fifteen per cent. was to be the limit.

The intent of the law is the law. The company accepted its charter *cum onere*. It was bound by its intent as closely as by the letter. The intent of the law was that the company should not receive for its own use unlimited profits. The acceptance of the charter by the com-

pany was an agreement on its part that it would not collect and appropriate to its own use unlimited profits. The limit was fifteen per cent.

If the company had obeyed the law, according to its manifest intent, it would have distributed all its net income as dividends until the stockholders had received their money and ten per cent. If it had then reported that fact to the legislature, it would have been in order for that body to act. It would have been within its discretion to approve and continue the schedule of fares and freights previously adopted by the company, or form a new one. In either case, the net profit exceeding fifteen per cent. would have been payable to the school fund.

But suppose the legislature had not acted, and the company had gone on under its former schedule of fares and freights, and made more than fifteen per cent. net profits. Would it have been entitled to keep the surplus, as against a subsequent demand by the state? It was certainly lawful for the company to fix its own rates until the state prescribed others. And the money which it made was its own, unless the law divested or qualified its title to it.

While it was the intention of the law that the company should not collect and appropriate to its own use in dividends net profits exceeding fifteen per cent. per annum after the stockholders had received back their capital and ten per cent., it was part of the same intention that more than fifteen per cent. profits should be earned and collected, if it could be done upon a just basis of rates.

This intention is manifest in all the provisions of the

act. It is certain that the legislature had the subject of rates in mind. It expressly gave up its control of them until the company should be able to get back its capital, and in order that it might get it back. And it expressly provided that that control might be resumed by it again, when that had been accomplished. And lest that plan might not work well, it reserved a power of purchase after twenty-five years.

With the first object attained—the road built and in operation; and the second object attained—the stockholders reimbursed their capital and interest, the third object was to see that the people were charged fair rates.

If, when the time came at which the legislature was entitled to fix rates, the schedule of rates already in force by the act of the company was a fair one, there would be no occasion for the legislature to do anything. It was not to control rates for the mere sake of controlling them that the power was reserved; it was to enable the legislature to see that they were just.

Nor was it for the sake merely of low rates; it was for the sake of fair rates. As already pointed out, it was impossible for any one to know in 1847 what would be fair rates a quarter or a half century later. It was likely, even then, that the railroad would revolutionize commerce and transportation. It was to be surmised, even then, that economic forces beyond the control of laws or legislatures would control the general course of rates for transportation, as well as the prices of commodities. The people who would use this railroad would be entitled to use

it upon terms that were fair by comparison with the rates for railway service over the country at large.

Pursuing the supposition just stated, if the company had reported to the legislature that it had repaid to the stockholders their capital and ten per cent., and was deriving from the road profits just sufficient to pay dividends at fifteen per cent. upon a basis of rates in harmony with those prevailing over the country generally, what would there have been for the legislature to do? Nothing.

The first object—the road—would have been attained. The second object—the reimbursement of the stockholders—would have been attained. The third object—the payment of dividends at fifteen per cent.—would have been attained so far, and in harmony with the desired condition of fair rates. The final object—the revenue for the school fund—would have proved, so far, unattainable.

And so long as that condition of things continued, though it should be for a century, there would be nothing for the legislature to do. All the ends of the law would have been accomplished, so far as possible, from year to year.

But if the time ever came, no matter how many years afterwards, when the profits exceeded fifteen per cent., the right of the legislature to act would take instant effect. It would be for it then to say whether the rates should be reduced so as to bring the net profits down to fifteen per cent., or retained, and the surplus paid to the school fund. The law would then have worked out its logical and complete end. All its objects would have been satisfied at last.

If in that case the company, without any action by the legislature, had gone forward with its business upon the basis of rates established by itself, and made profits in excess of the amount necessary to pay dividends at fifteen per cent., would the right to the surplus have been in it, or the state?

It would have been money lawfully collected—collected in accordance with the right of the company and the purpose of the law, but money which the company had no right to keep; money which the law had been looking forward to through all the years following its enactment; money consecrated to the school fund when the foundations of the corporate structure were laid in the act of 1847. Such a situation creates a trust—money received by right, but which the recipient has no right to retain to his own use.

If the company, after repaying the capital and interest, and dividends at fifteen per cent., found itself in possession of a surplus of profits, and if, under the law, it held that surplus in trust for the state, there was an implied duty resting upon it to report that fact. And if it omitted to do so, it could not set up the delay of the legislature to demand a report as a relinquishment of its right to make such a demand at a later period.

We have carried the argument forward through this series of suppositions because that seems to us to be the best way to exhibit the intent of the legislature. If each step in the evolution of the undertaking had worked out in order, according to the manifest intent of the law, to

a given point, we can say with considerable assurance of certainty what would have been within the contemplation of that intention as the next step.

Suppose that the business had actually proceeded in that way; that the company, pursuing the spirit and intent of the law, had built the road, reimbursed its stockholders, paid a year's dividends at fifteen per cent., and reported a surplus in its hands. Upon what ground could it have contested the right of the legislature to direct its payment into the school fund?

Would it be said that the profits had not been earned under a tariff of charges enacted by the legislature, but under one established by the company itself? But if the tariff established by the company was a fair one, why should the legislature change it? And if there were no occasion to change it in the interest of fairness, what could the legislature do? Go through the mummery of enacting by law the same rate of charges already lawfully established by the company?

Would the legislature, by an empty form of regulation consisting merely of adopting the company's schedule, acquire a right to surplus profits which it would not have if the same profits had been made on the same business transacted at the same rates without interference by the legislature? Such a distinction seems absurd.

It is impossible to deny that, if the time had arrived when by the terms of the act the legislature was entitled to regulate rates, and the legislature, in pursuance of the power therein reserved, had regulated them, and a

surplus of profits had resulted, it would have been the right of the legislature to direct its payment to the school fund. It was equally within the power of the legislature to increase or to diminish the rates previously established by the company; or to adopt them without change. We can not impute to the legislature any purpose in taking the control of rates out of the hands of the company except to make them fair. And if, when its right to control them accrued, it found those existing by the act of the company fair, it would be guilty of wrong to change them.

As already pointed out, it is not to be assumed that it would be the wish or the duty of the legislature to require the company to do business at the lowest rates under which it could make fifteen per cent. net profit. No one foreknew what advantages this railroad might have. The growth of the three cities to be joined by it—Terre Haute, Indianapolis and Richmond—the course of prices and cost of railroad building in the future, might make it possible for this road to do business at less than the rates current generally through the state and country, and yet pay its authorized dividends with a surplus over. Would it be fair for the legislature to compel by law an inequality of charges against the people for the same kind of service, for the express purpose of preventing the school fund from deriving revenue from the company's business?

It seems to us, therefore, that we are driven to this alternative: It was either the duty of the legislature to interfere in the matter of rates only when and as it was necessary to do so, in order to preserve their fairness

(subject to the company's right to make fifteen per cent.), and then let the matter of profits take care of itself and produce a revenue for the school fund if it would, or none if it would not; or else it was its duty to watch the course of business and prevent the accruing of revenue to the school fund by reducing rates when necessary for that purpose, without regard to the necessity, justice, or fairness of the reduction toward the public generally.

There does not seem to us to be anything in the act, or the attending circumstances, or the general course of such legislation in the country at the time, or in the demands of justice, to justify the imputation of such an absurd intention to the legislature. It interprets the act to mean that the school fund was to serve the mere purpose of a slopjar to receive such driblets of surplus revenue as the legislature should be unable to prevent from accruing, notwithstanding its best efforts to do so.

No less absurd is the contention that the legislature could acquire the right to direct the payment of surplus profits to the school fund only by first establishing rates. Such a construction ignores the existence and justice of such a thing as fair rates, and sets up an artificial distinction between legislative rates and company rates. It is to the effect that surplus profits made on the basis of legislative rates would belong to the school fund; but the same profits made on the basis of company rates would belong to the company, although the company's rates might be absolutely fair.

Will it be seriously argued that the legislature, having

no right to turn surplus profits made on company rates into the school fund, could acquire such a right by a merely nominal change in rates—a change just sufficient to make it possible to say that the legislature had established a schedule? Such a performance would seem like child's play rather than man's work.

It was common, at the time, to require railroad corporations to contribute to the public revenue in consideration of the franchise bestowed. To construe this act to embody that intention in provisions which were to come into effect only in case such contribution should arise from the business of the company transacted at fair rates —rates approved, adopted, or changed by the legislature as might be necessary to make and keep them fair, is consistent with its language, with the spirit of the time, with the attending circumstances, and with plain, simple justice to all persons and interests concerned.

It is not material to this discussion whether the legislature expected that the revenue to the school fund would be large or small, regular or irregular; nor is it material what the fact would have been in that regard if the intent of the law had been carried into effect. The law provided with equal certainty for all magnitudes of surplus—little or great. It did not permit the company to keep any—no matter how small, nor how great.

The legislature never took any action on the subject of rates. A reason for that is given in the allegations of the complaint in respect to the conduct of the company. If no such reason existed, it would be presumed that the

legislature omitted to interfere because there was no occasion for its interference—because the company's rates were fair.

It does not lie in the mouth of the company to say that it charged and collected unfair rates, and made by that means a surplus of profits which it proposes to keep because it was made by means of unfair rates. It must be assumed in this discussion that the rates charged, and on the basis of which the profits alleged in the complaint were made, were such as were usual. If so, there was no occasion for the legislature to change them, and it is to be presumed that it would not have changed them if it had taken the matter in hand.

If these reasonings are sound, it follows that it was within the intent of the law of 1847, as enacted:

First, to secure the building and operation of the road;

Second, to return to the stockholders their invested capital and interest;

Third, to secure to the people the use of the road at fair rates (by legislative intervention and regulation if necessary), subject to the right reserved to the company to make fifteen per cent. dividends out of it; and

Fourth, to devote such surplus revenue as there might be after satisfying all these conditions, to the use of common schools.

That intent was not altered or affected by the repeal of section thirty-five. That repeal was the mere surrender of an option on the part of the state to purchase the company's stock.

The law imposed a duty on the company which it could not evade by any formality of proceeding. If it made profits which it could divide in dividends, it was its duty to divide them accordingly. If, instead of performing that duty, it made some other disposition of the money which inured to the benefit of the stockholders, such disposition of it was the equivalent of a distribution in dividends under the act.

If that course of business continued until an amount of profits had been earned which would have reimbursed the stockholders their capital and interest if it had been distributed in dividends, they were reimbursed within the meaning and purpose of the law. They can not be heard to say that they were not. The money was in their own hands. If they chose to invest it for their collective use instead of distributing it for their individual use, such investment was the equivalent of distribution for the purposes of the law.

The legislature then became entitled to regulate rates, and the school fund entitled to the surplus profits. It is to be presumed that if the legislature had known the facts it would have regulated rates, if they needed regu lation; if the rates established by the company were just and fair it would have let them alone. If any profits had been made over the amount necessary to pay dividends at fifteen per cent. on the capital invested, the legislature would have demanded its payment into the treasury for benefit of common schools.

According to the allegations of the complaint, the com-

pany made net profits sufficient to repay the capital invested and ten per cent.; but instead of distributing it among the stockholders as dividends, invested it for their benefit in the name of the company in divers ways. After that it made net profits sufficient to pay dividends on the capital invested at fifteen per cent. and a large surplus over. A large part of these also it invested in divers ways for the benefit of the stockholders, instead of distributing the same in dividends.

So that the stockholders never received, as dividends, the sums which they were entitled to receive under the terms of the act, before any surplus profits would be coming to the school fund. But they received in other forms amounts which might have been distributed as dividends, and which would have paid them all the dividends authorized by the law, and would have left a large surplus for the use of the school fund under its terms.

And this, it is averred in the complaint and admitted by the demurrer, was done for the express purpose of deceiving and misleading the legislature; for the purpose of making it appear on the face of the business that conditions prescribed in the law upon which surplus profits would be payable to the school fund did not exist, and so preventing any demand therefor by the legislature.

Surely it need not be argued that the company could not evade its just obligations to the state by any such contrivances as these. Every dollar which came to the hands of the company under such circumstances that it was accountable for it to the school fund upon the de-

mand of the state, remained subject to that charge through all transmutations of bookkeeping and metamorphoses of form.

In a substantial sense, if not in a literal one, all surplus profits received by the company after the amount collected was sufficient, if it had been applied as contemplated by the act, for the repayment of capital and interest, and the payment of fifteen per cent. dividends, were held in trust for the school fund upon demand of the state. An effort to escape from such a liability only fastens it the more irremovably upon the delinquent trustee.

These conclusions derived from the provisions of the act alone are in entire harmony with the principles applicable to the general construction of the powers of corporations. We have become so accustomed of late years to the free and easy assumption by corporations of all the rights and privileges of individuals, and more, besides, that we are liable to forget that they are mere creatures of law and have no powers except those expressly granted or indispensably necessary to the exercise of those expressly granted. But that old rule is still the law; and it is one of the fundamental principles to which it is wholesome to recur occasionally. The cases which illustrate it are so numerous that a few samples will suffice. We take for example the vigorous language of Black, C. J., in Commonwealth v. Erie & N. E. Railroad Company, 27 Pa. St. 339, quoted from page 351:

> "This case requires us to give a construction to the charter of a private corporation. The fre-

quency of such cases excites some surprise, when we reflect that an act of incorporation is and always must be interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words, or by necessary implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the Attorney-General, or anybody else, should complain against a company that keeps itself within bounds, which are always thus clearly marked, and equally strange that a company which has happened to transgress them should come before us with the faintest hope of being sustained. In such cases, ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them.

"Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because whatever is doubtful is decisively against the corporation."

In Holyoke Co. v. Lyman, 82 U. S. 500-511-12, Justice Clifford states the rule, as follows:

"Repeated decisions of this court have established the rule that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in

> favor of the public, and that nothing passes but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such acts is taken to have been withheld, as all acts of incorporation, and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations."

In Stourbridge Canal Co. v. Wheeley, 2 B. and Ad. 792, it is said:

> "The canal having been made under the provisions of an act of parliament, the rights of the plaintiff (the company) are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act."

This statement of the law is quoted in 4 Thompson on Corporations, sec. 5661, with approval, and the statement that it "has been frequently referred to with approbation."

In the very recent case of Covington, etc. Turnpike Co. v. Sandford, 164 U. S. 578, the controversy arose upon a statute of Kentucky, limiting tolls on a specified portion of the Covington and Lexington turnpike. A former corporation was chartered in 1834 to build the entire line from Covington to Lexington. By an amendment of the act it

was provided that in a contingency stated, the legislature should be entitled to reduce the rates so that the dividends should amount to fourteen per cent. and no more. Afterward, the franchises of the original corporation passed to two new corporations, between which the road was divided in two portions. The act in controversy reduced rates on one of those portions. The opinion was by Justice Harlan, and in the course of it he said, page 585:

> "Whatever authority, therefore, the general assembly had by statute to regulate the tolls of the plaintiff in error arose from its general power to regulate the affairs of a corporation, which came into existence by its authority, and which owned and controlled a highway established for public use.
>
> "Was the Covington and Lexington Turnpike Road company entitled, under its charter, to be exempt from legislation that would prevent it from earning at least fourteen per cent. 'upon the capital stock expended upon said road and its repairs,' as prescribed in the act of 1834?"
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> * * * * * * *
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> "The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislature intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable inter-

pretation of its statutes. It is as vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation of 1834, the legislature intended to exempt the new corporation, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent. on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted."

The court below, in passing upon the sufficiency of the complaint in its opinion beginning on page 656 of the record, said upon this question:

"It is averred in the complaint that the legislature never regulated the tolls and freights to be charged by appellant, and the question is, was such regulation required by the charter as a condition precedent to the state's right to the earnings in excess of the amounts specified? It is obvious from the sections quoted that the lawmakers had in mind a scheme which contemplated not only liberal profits to investors, but, as well, security to the

public against extortion, and a contingency in which the common school fund should become entitled to share in the profits of the enterprise. The provisions of these sections may be better understood by looking at them from the point of view held by the legislators at the time of their enactment. Since the occupation of the territory the people of the state had sorely felt the need of highways as means of intercommunication and for reaching the markets. At that time perhaps more laws had been passed by the legislature relating to roads than had been passed upon all other subjects combined, and to meet the still pressing demand the state in 1836 had undertaken a general system of public improvements, which provided for the construction of many highways, including turnpikes, canals and railroads. This venture on behalf of the state had proven disastrous, and all work begun thereunder had been abandoned as early as 1842; leaving the state with a prostrate credit, and unsupplied with necessary highways. Furthermore, popular education had also been a matter of chief concern. In the organization of the state government in 1816 the people had declared, as a part of their fundamental law, for a public school system in which instruction should be free and equally open to all. Article 9, section 2. Subsequent legislation in accord with the constitutional requirement had given unmistakable prominence to the desirability of free schools. Most, if not all, of the financial resources of the state, other than taxation, had been and were being appropriated to the accumulation of a permanent fund for the maintenance of such schools. Here, then, we

find the legislature confronted with a popular demand for more highways and a more ample school fund. The state could neither build roads nor appropriate school funds. She had no money and no credit. Private capital must be induced to engage in such enterprises. Railroads, as freight carriers, were at the time attracting prominent attention. Massachusetts had led in 1826 in the construction of the first railroad in America, the same being a line from Quincy to tide water; and so rapidly had such roads arisen in favor, that in 1847 there were in successful operation more than 5,000 miles of railroad in the Eastern and South Atlantic states. 14 Am. Cyc. Our own state had felt the impulse of railroad building. No less than twenty-five charters for the construction of railroads had been previously granted, but none had proceeded to completion. In 1836, in its great system of internal improvements, the state had provided for the construction of a railroad from Madison to Lafayette, via Columbus, Indianapolis and Crawfordsville; thus opening up to general markets, through the Ohio river and the Wabash and Erie canal, three populous and fertile sections of the state. The latter work was entered upon, but the state, finding that it had undertaken more than it was able to accomplish, in 1843 turned over to a private corporation the incompleted portion between Madison and Indianapolis. The receiving company's president in February, 1846, reported to his board of directors that the road still lacked thirty miles of reaching Indianapolis. It was probably completed in that year. So it may be assumed that the legislature of 1847, convening so shortly after the

opening of the first railroad in the state, while in a mood to give friendly consideration to the proposals of a body of men to build with their own money a railroad through another important section of the state, yet the members were undoubtedly without the necessary data as to cost of construction and equipment, expenses of operation, and earnings of railroads to enable them to settle upon definite terms and franchises, fair alike to the corporation and the public. There existed reasons, too, why an east and west line across the state from Terre Haute to Richmond should be regarded as the most profitable line in the state for a railroad. The route for the entire distance paralleled the national road, a great thoroughfare previously constructed by the federal government, eighty feet wide, from Maryland to the Mississippi river; thus furnishing the rapidly increasing population of the seaboard a spacious highway into the broad and fertile regions of the west. Along this only way the stream of emigration had flowed for several years. Cities, towns and populous communities had gathered along its borders. New settlements sought continuity with it. National attention had been drawn to it as the only highway between the east and the west under the fostering care of the national government. The proposed new railroad was thus to run along the channel of direct commerce and communication, as fixed by congress, between the Atlantic and Mississippi valley, and would be the first to enter the open door of the great prairies of Illinois. At any rate, when the subject came up the legislators were not so swerved by their enthusiasm for railroads

as to make reckless concessions to the incorporators; for, liberal as they were required to be, and were, to induce the investment of private means in a novel venture, it is very plain that they had, from present considerations of some character, confidence enough in the ultimate profits of the enterprise to set a limit to the corporation's money making. The paramount consideration, doubtless, was such a scheme as would attract private capital. Here are some of the inducements held out to investors: (a) The company was to have, at the beginning of business, unrestrained power to charge such rates for the transportation of freights and passengers as seemed to it to be to the interest of the company, and power to raise and lower such rates at pleasure. Section 22. Under this power it could have been pointed out that the managers of a railroad, susceptible of easy and inexpensive construction, linking the west to the east, tracing the thickly inhabited border of the national road, touching at the state's capital, could unquestionably so adjust its tariffs as to meet the requirements of a satisfactory investment. (b) In effect, the state proposed to suspend the exercise of its sovereignty, and allow the company to continue uncontrolled and uncontrollable in its exactions from the people, until the investors had received back as dividends the full sum invested, and 10 per centum per annum thereon, and to thereafter continue in perpetuity to charge and collect such tolls as would net them two and one-half times the legal rate of interest. (c) The state guaranteed that the company should enjoy in perpetuity the right to charge such tolls as it liked, upon failure of the builders to receive back

as dividends the full sum invested, and 10 per centum thereon, and, if at the end of twenty-five years (section 35) the state elected to purchase the road, it could do so only by paying the stockholders the full cost of the road, and 10 per centum thereon. (d) The state should never, even after the builders had been fully reimbursed, interfere in the matter of charges so as to reduce the profits of the stockholders below 15 per centum per annum.

"The legislature was not free to do as it would. It had to do the best it could. The state's effort at making public improvements had irretrievably failed. Private capital must be enlisted, or the people do without railroads. The best offer to make was one that would promise investors the speediest and surest return of their money, and, to that end, give them the most absolute control of the means by which the money was to be made. That accomplished, other interests might then be protected. So it was provided (section 23) that when the stockholders had been reimbursed, and had received back all they had put in, and 10 per centum per annum thereon, and still retained their shares, the state should then become entitled to resume its sovereignty, and the cherished school fund afforded a chance for enlargement. The language is that when the money invested, and interest, had been fully returned, 'the legislature may so regulate the tolls and freights that not more than 15 per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses, and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state for

the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum can not be made.' The situation of the legislature was unique. The fiscal depression that followed the collapse of the state's recent undertakings had not been restored. The people were clamoring for better ways of reaching the markets. The expenses and earnings of a railroad were problematical. How generally the people would patronize the road was only conjectural. The profits might be small or very large. One seemed as probable as the other, and, when the inducements had been made sufficiently strong to assure the investment of private capital on the basis of small profits, then, on the basis of possible large profits, there arose the twofold duty of protecting the people from continued wrong and oppression, and to secure for the state something valuable for the large franchises granted. Reasonable capitalists would not hesitate to accede to such terms when it was provided that they should operate only after the investors had received back all their investments, with interest largely in excess of the legal rate. With these various interests, objects and purposes in view, the plan outlined in section 23 was adopted.

"At least three reasons appear for believing that the intention was that the stockholders should not, after becoming reimbursed for their outlay, at any time or under any conditions, have more of the net earnings than 15 per centum per annum of the sum invested: First. The irrevocable right to 15 per centum, expressly conferred, negatives a right to more. Second. The faithful account of con-

struction, of expenses and receipts required by sections 23 and 35, and the mandatory language employed in disposing of the 'surplus,' implies the contemplated existence of a substantial balance. It seems entirely improbable that the legislature intended the mockery of providing for the payment to the school fund of the fraction remaining after that body had adjusted the tariffs of the company so that the net earnings should be just 15 per centum of the shareholders' investments—no more and no less. Third. It is clear that the lawmakers considered that under their liberal grant the time might come when the corporation would be receiving larger profits than were just, and when that time arrived, if ever, any earnings in excess of fairness should be relinquished by it. The limitation that entered into this consideration is stated as affecting the periods both before and after full reimbursement of the builders, and it seems incredible that the legislators should deem it expedient to declare their sense of what was just and fair to the shareholders and state, dispose of the excess over the limit fixed by them, and then provide, or leave for construction, that the company's right to the unjust excess should accrue by legislative inaction on the subject of regulating its tolls.

"But it is argued that the statute required the legislature to regulate the tolls and freights of the company, as a condition precedent to the state's right to the earnings in excess of 15 per centum; and in support of the contention it is insisted that 'may so regulate,' as used in section 23, should be read, 'shall so regulate.' We are unable to accept the argument as sound. If 'may' should be con-

strued as mandatory, when shall the legislature begin to act? The statute says 'when the aggregate amount of dividends declared shall amount to the full sum invested and 10 per centum per annum thereon' shall be the time when the legislature may begin regulating the tolls. It is certain, however, that conditions might be such at that time, and even after, for that matter, that the legislature would have no power to act. The stockholders might have reached reimbursement by earnings less than 15 per centum per annum, and the time might never come when they earned so much as 15 per cent. per annum; and hence the power to regulate, declared to exist, would be, and might ever continue to be, without the right of exercise, and therefore a nullity, for it is expressly provided in the same section 'that the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of 15 per centum per annum can not be made.' The legislature will not knowingly command a thing to be done that is impossible of accomplishment, nor will it willingly command a thing to be done that ought not to be done. Perchance it might happen when the time came that the stockholders had received back their full investment, and were continuing to receive more than 15 per centum per annum, that the state ought not to change the established and prevailing rates of the company. It should be borne in mind that the right to regulate was primarily intended for the protection of the people. All the protection the people were entitled to was fair rates, as compared with the rates elsewhere charged on other roads over the country. The railroad company

might find from experience that the friendship of the communities traversed was valuable, and that the interests of the company lay in such fair rates as would invite business and stimulate trade. So when the legislature became entitled to interfere it might find a schedule of rates in force by the company that was perfectly fair and perfectly satisfactory. In such case, will it be said that it was meant that the legislature should change it? Then, again, as we have seen, the proposed road would occupy a route of exceptional advantages for business—advantages apparently so favorable that a schedule of charges fair and necessary on other railroads in the state might upon this prove sufficient to produce an income in excess of 15 per centum. In such case was it intended to make it the duty of a subsequent legislature to reduce the rates of the company to the lowest point at which 15 per centum could be made? It is the duty of the state to treat its citizens alike, and to see that others who exercise public powers do the same. So when the state should undertake to regulate the tariffs of its railroads, it must make such tariffs uniform. It could not require the people between Indianapolis and Terre Haute to pay one mileage rate, and the people between Indianapolis and Madison to pay another. If the legislature should find such facts existing with respect to rates when the state regained its power of supervision, there would exist not only no duty to change the rates it found in force, but it would be wrongful to change them. Will it do to believe that it was meant by the legislature, in the adoption of appellant's charter, or so understood by the incorporators at the time of the acceptance, that

if it should turn out that fair rates formulated and established by the company should produce more net profits than 15 per cent. of the investment, the state must go through with the form of adopting and enacting into law the same fair rates, to acquire a right to the surplus? The intent of the law is the law. The reasonable and true interpretation of the provisions under review seem to be: First, that the matter of regulating the tolls and freights of appellant at any permissible time rested solely in legislative discretion; second, the incorporators were absolutely limited, in the profits of the enterprise, to the full sum invested, and 10 per centum per annum thereon, and thereafter to an annual dividend of 15 per centum upon the capital employed; third, when the stockholders had received the limit, the surplus, if any, remaining after the payment of expenses, and reserving such an amount as shall be necessary for future contingencies, should be paid over to the treasurer of state for the use of the common schools, without reference to whether the legislature had, or not, previously regulated the tolls and freights of the company. 'A doubtful charter does not exist, because whatever is doubtful is decisively against the corporation.' Com. v. Erie & N. E. R. Co., 27 Pa. 339-351, 67 Am. Dec. 471; Water Power Co. v. Lyman, 82 U. S. 500-511, 21 L. Ed. 133; Road Co. v. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Canal Co. v. Wheeley, 2 Barn. & Adol. 792; 4 Thomp. Corp. § 5661."

THE ADJUDICATION IN THE SUIT INSTITUTED IN 1875 IS NOT A BAR TO THIS ACTION. THE EVIDENCE OFFERED BY THE APPELLANT IN SUPPORT OF THE PLEA OF FORMER ADJUDICATION DID NOT SUSTAIN THE ANSWER. IT WAS INCOMPETENT, AND WAS PROPERLY EXCLUDED.

The answer will be found at page 47, and the reply thereto at page 52 of the record.

The items of evidence offered to support the answer were:

1. The agreement set out in the answer.
2. The proceedings in the *quo warranto* case.
3. The attorney-general's report of the agreement to the governor.
4. The complaint in the action begun in 1875.
5. The opinion of the superior court judge sustaining the demurrer to this complaint.
6. Joint resolution No. 16.
7. The judgment in the 1875 suit. (Record, pp. 592-624.)

The evidence was excluded by the master, and this ruling as to each item of the evidence, was made the basis of exceptions by the plaintiff in error. (Record, pp. 132-133.)

These exceptions were overruled by the trial court (record, p. 133), and the rulings affirmed by the supreme court. (Record, pp. 671-672.)

The complaint in the suit instituted in 1875 was bad, and the demurrer was properly sustained thereto, because it contained no averment of demand, demand being a necessary condition of the institution of such a suit.

The decisions of the trial court and supreme court upon this question were that the attorney-general had authority to bring the action, but that it was prematurely brought, as no demand for an accounting and payment of moneys sued for was alleged to have been made, and none had in fact been made, at the time the action was brought. This was held in the first instance upon the demurrer to the complaint (record, pp. 42-43), and again in overruling the demurrer of plaintiff in error to the reply to the third paragraph of answer, both of which rulings were affirmed in the supreme court.

Section 23 of the act of 1847 provided that: "It shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures, and the amount of profits after deducting all expenses, which statement shall be made under the oath of the officer whose duty it shall be to make the same."

In 1875, at the time of the institution of the suit in question, the legislature had taken no action with reference to its rights against the appellant. It had not required any statement or report from the corporation, showing the conditions of its affairs upon which the legislature might base any demand or action that it might see fit to take to require the appellant to account with and pay over the amount, if any, that might be due it.

It is clear that under the provisions of section 23 of the charter, it devolved upon the general assembly to take action before it could be ascertained whether there was any amount due to the state from the appellant; and until

such statement was required and made, or until such time as the general assembly should take action with reference to the matter by either demanding an accounting, or authorizing some officer of the state to do so, the state had no present right of action against the appellant, and this action never having been taken previous to 1875, there was no authority in any officer of the state to institute suit against the appellant, and the suit so brought was premature, and instituted before the necessary steps had been taken to entitle the state to recover.

As we have said, before the right of action matured, it was necessary that the general assembly should have taken action with reference to the matter; that a demand for an accounting should have been made upon the appellant, and the appellant required to account for and show what amount, if any, was due the state under the provisions of section 23, and until this demand was made, no right of action accrued. The money due from the appellant was held by it in trust for the treasurer of state for the benefit of the common schools. It was lawfully in the possession of the appellant, therefore, a demand for an accounting and payment was necessary before a suit could be instituted.

If, therefore, a demand was necessary, the suit instituted in 1875 was prematurely brought, as at that time no right of action had accrued, nor did it accrue until the general assembly had acted, and it had not, at that time, made any demand, or required any statement from the appellant; so the suit instituted in 1875 was brought prema-

turely, and is not a bar to this action, and the state is not estopped by the judgment rendered in that cause.

A suit prematurely brought is not a bar to a suit subsequently brought after the cause of action has properly accrued.

Brackett v. People, 115 Ill. 26;
Krapp v. Eldridge, 33 Kans. 106;
Seaton v. Hixon, 35 Kans. 663;
Roberts v. Norris, 67 Ind. 386-392;
Griffin v. Wallace, 66 Ind. 410-418;
Indianapolis, etc., Co. v. Clark, 21 Ind. 150-153;
Kirkpatrick v. Stingley, 2 Ind. 269-273.

The authorities cited by the plaintiff in error to sustain their contention that no demand was necessary, and therefore that it was not necessary to aver a previous demand in the complaint filed in 1875, are not in point, as they are cases in which the time for the payment of money was fixed by contract or by law, and in which there was an absolute duty to pay at a fixed time, imposed upon the party liable to pay the money. As we have seen, under section 23 of plaintiff in error's charter, there was no fixed time for the payment, and no action could be taken until such time as the legislature should act.

The issues involved in the case at bar are not the same as those presented by the case brought in 1875. In the complaint in the case instituted by the attorney-general in 1875, there was no allegation of demand having been

made by the state, and no showing of any action taken upon the part of the state through its legislature.

The case at bar, as shown by the complaint, was brought after a demand made, in pursuance of the act of the legislature of March 4th, 1897, instructing the attorney-general to demand an accounting and payment, and to enforce the collection of any amount due to the school fund. Therefore there is a very marked difference between the issues involved in the two actions.

It is well settled that a judgment on the merits of the cause of action is a bar to any future suit for the same right. It is also well settled that if the record in the former suit is ambiguous, and does not show what was decided, or, if there were two or more issues that might have been decided, extrinsic evidence may be introduced to explain the record, and show what was, in fact, decided, but such evidence is never allowed to contradict the record, or to show that issues not presented by the record were decided. The cases cited in appellant in error's brief, are all, we think, of this character.

It is also settled law that a judgment on demurrer going to the merits of the case, falls within this rule, for the reason that it can make no difference whether the facts are admitted, or are found from the evidence; when once established the decision on them is final. So far, a judgment on demurrer and a judgment after trial, are identical in effect, but there is a wide difference between a judgment for the defendant on a demurrer to the complaint, and judgment on other demurrers. The rule as to such judgments is, that a judgment for the defendant on demurrer

to a bad complaint is no bar to a subsequent action for the same right on a good complaint.

Stevens v. Dunbar, 1. Blackf. 56;
Sherry v. Foresman, 6 Blackf. 56;
Estep v. Larsh, 21 Ind. 190.

When a new declaration by new averments would not be demurrable, the second suit is not barred, as the issues are changed.

24 Am. and Eng. Enc. Law (2d edition) 800.

In Gould v. Evansville, etc., Railroad Company, 91 U. S. 526, the court, after stating the general rule applicable to judgments, rendered on demurrers, says, on page 534:

> "Support to those propositions is found everywhere; but it is equally well settled that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." Citing:
>
> Gilman v. Rives, 10 Pet. (U. S.) 298;
> Aurora City v. West, 7 Wall. 90;
> Richardson v. Barton, 24 How. 188.

In Gilman v. Rives, the court said, at page 301:

> "The objection may be urged, that the judgment upon a general demurrer, in this case, will be a

> good bar to any future suit brought against the present defendant, upon the same debt, or against him and the other judgment debtor. We are of a different opinion as to both if the declarations be properly framed; for a judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits."

The same point is decided in:

Post v. Pearson, 108 U. S. 418;
Smith v. McNeal, 109 U. S. 426;
Hughes v. United States, 4 Wall. 232.

See also to this point:

Wilbur v. Gilman, 21 Pick. 25;
Lepping v. Kedgewin, 1 Mod. 207.

This distinction is fundamental, and appears plainly when it is considered that the reason for allowing a judgment on a demurrer to act as an estoppel is, that by such demurrer the facts pleaded are admitted. So, if the plaintiff's demurrer to the answer is overruled, and judgment is entered against him, he has admitted the facts set forth in the answer to be true, and the court has decided that such facts are a good defense to his claim.

So, too, if judgment is rendered on a decree overruling the defendant's demurrer to the complaint, the facts set forth in such complaint are admitted to be true, and the

court has decided that such facts entitle the plaintiff to recover. In both these cases the merits were decided; the facts by admission of the parties, and the law as applied to these facts, by the court.

But when the defendant demurs to the complaint, the plaintiff admits nothing. The defendant admits the facts set forth to be true, but the plaintiff does nothing except to maintain that those facts set forth in his complaint entitle him, as a matter of law, to recover. On the other hand, the defendant, by his demurrer, asserts that they do not entitle the plaintiff to recover, and that is the only issue raised by the pleadings for the court to decide as against the plaintiff. He is asserting nothing else; he is admitting nothing.

The statute under which the demurrer is permitted, provides that "the defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action."

1 Burns R. S. 1901, §342 Subdiv. Fifth.

The ground for demurrer is, that the "complaint does not state facts" that entitle the plaintiff to recover. So the issue, and the only issue raised is, whether the precise facts set forth entitle the plaintiff, as a matter of law, to maintain that action. When the court sustains the demurrer, it passes upon that question, and that question only, and does not assume to say that, if in addition to the facts set forth, another fact was pleaded, the complaint would

be good or bad. That would be passing upon an issue not raised by the pleadings, and could not be decided if such fact were not pleaded. Since the court can only pass upon the issues raised by the pleadings, extrinsic evidence is not admissible to show that, in ruling on a demurrer, it ruled, not that the complaint demurred to was bad, but that a complaint containing the same facts, together with any other facts the plaintiff might put into it, would be bad. That would be a direct attack upon the record by an attempt to show that an issue was decided by the judgment that could not possibly arise from the pleadings. "It is not competent for the court, in any event, to conclude the parties in respect to any matter which was not included within the issues."

McFadden v. Ross, 108 Ind. 512.

This distinction between a judgment sustaining a demurrer to the complaint and one sustaining a demurrer to an answer, was recognized and applied by the supreme court of Indiana in the case of Wilson v. Ray. In that case the defendant pleaded, in bar to the action, a former judgment overruling a demurrer to the answer, and the court, in distinguishing the case of Stevens v. Dunbar, 1 Blackf. 56, cited above, said:

> "In that cause (Stevens v. Dunbar), the judgment relied on as a bar was rendered in favor of the defendant upon a demurrer to the declaration. In such a case, in the nature of things, the judgment could not be a bar to a subsequent suit, founded on a good complaint, for therein would be

> the difference between the former and latter action. But a judgment on a demurrer to a good defense, in favor of the party pleading it, is a bar to a subsequent suit for the same cause of action, for the plaintiff, by his demurrer, admits of record the truth of the answer."
>
> Wilson v. Ray, 24 Ind. 156.

So the rule that a judgment for the defendant on a demurrer to a bad complaint can never be a bar to a subsequent suit for the same right on a good complaint, applies in every case, for the reason that the only question that could be decided in the first case was, that the complaint in that case was bad, and not that a complaint containing additional averments, which made it good, would be bad. The mere statement of such a thing shows its absurdity.

A comparison of the complaint in the former case and the present complaint will show that they differ in that the present complaint alleges that a demand was made on the part of the defendant in error for the money due it under the appellant's charter, and that this demand was made subsequent to the rendition of the final judgment in the former case, and that such demand was made in compliance with the action of the general assembly requiring it to be done.

In the former complaint no such demand was alleged, but in other respects the complaints are substantially the same. Lacking this averment, it is admitted that the complaint was bad, and the court having so decided when the issue was raised by demurrer, and having rendered judgment for the defendant, the defendant in error is estopped

to bring another suit by a complaint stating no additional facts. But that judgment is no bar to the present suit, brought on a complaint made good by the additional averment of a demand made pursuant to the requirements of the general assembly. To hold otherwise it would be necessary to say that the court, in the former case, held that the facts stated in the complaint in that case, together with the fact not stated, of a demand, did not entitle the plaintiff to recover. In other words, that it injected an issue into the case which the parties themselves had not placed there, and then decided that issue. The defendant, by its demurrer, did not admit that there had been a demand, nor, if the defendant had answered instead of demurring, could the plaintiff have introduced evidence of a demand on the trial. Since that is so, it is impossible to argue that the fact of a demand was in issue, and if it was not in issue, the court had no right to decide that the facts which were in issue would not have constituted a cause of action if a demand had been in fact alleged.

This is obviously the meaning of the rule that a judgment for the defendant on a demurrer to the complaint does not bar a subsequent action on a good complaint. In other words, it means that a general demurrer to a complaint only puts in issue the sufficiency of that complaint, and in sustaining the demurrer to it the court only decides, and can only decide, that one question, and never decides as to the sufficiency of another complaint presenting a good cause of action, for the reason that the question of the sufficiency of the second complaint is not before it.

THE EVIDENCE OFFERED IN SUPPORT OF THE ANSWER WAS PROPERLY EXCLUDED.

The proposition that the former judgment was not a good bar to the present action involved the exclusion of the record of that judgment, when, upon being offered in evidence it appeared upon the face of the proceedings that the complaint did not aver or show that a demand had been made.

The record shows what the issue in the former case was, and is not doubtful or obscure; there was no other issue that might have been decided, so there was no reason or room for the admission of extrinsic evidence, whether parol or written, to show what was decided.

And, therefore, the evidence offered outside of the record, in support of the appellant's plea of former adjudication, was not competent, and was properly rejected. The opinion of the judge was not made a part of the record of the former suit by order of the court, or bill of exceptions, and was no part of the record.

1 Burns R. S. 1901, §662.

It was as much extrinsic evidence as would have been an oral statement of the judge as to the grounds of his decision made outside of court.

State ex rel. Yancey v. Hyde, 129 Ind. 296;
England v. Gebhardt, 112 U. S. 502, 506;
Insurance Co. v. Tweed, 7 Wall. 51;
Kentucky Ins. Co. v. Hamilton, 63 Fed. 93.

It was properly excluded for another reason.

The answer did not allege that the opinion had been given, or in any manner aver or show its contents either in the body of the answer, or as an exhibit. See the answer as set out in the record, page 47. The fact that such an opinion had been given was therefore not admitted by the filing by defendant in error of a reply merely in confession and avoidance.

1 Burns R. S. 1901, §§367, 386.

It could not be received in evidence, even if otherwise competent, without proof that it was in fact the opinion given by the court. Such proof was not made or offered, and this, if there were no other objection, is enough to show that no error was committed in excluding the opinion. It is well settled that such rulings will be sustained upon any sufficient ground that in fact existed, although neither the objection nor ruling were at the time placed upon such ground. The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed.

McClung v. Silliman, 6 Wheat. 598, 602;
Penn. Railroad v. Wabash Railway, 157 U. S. 225, 229;
Silsby v. Foote, 14 How. 218;
Baldwin v. Threlkeld, 8 Ind. App. 312.

Respectfully submitted,

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